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Supreme Court, U.S.
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No. 02-1224

IN THE

Supreme Court of the United States

ESTATE OF VICTOR WOSKOB,

Petitioner,

v.

LEAH BETH WOSKOB,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED
(Restated)

1. Whether a general partner's filing of a bankruptcy petition under Chapter 11 of the Bankruptcy Code results in the dissolution of the partnership under the Pennsylvania Uniform Partnership Act, where the non-debtor partner never objected to the assumption of the partnership contract by the debtor-partner, and has chosen to continue in the partnership with the debtor-in-possession following the bankruptcy filing?

2. Whether the Pennsylvania Uniform Partnership Act mandates that the actions of a partner in excluding another partner from the partnership in violation of the partnership agreement results in the instantaneous dissolution of the partnership, where following such actions, both partners have continued to hold themselves out as partners and neither partner has sought a decree of dissolution under the Section 8354 of that Act.

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REASONS FOR DENYING THE WRIT

1. The Third Circuit's Opinion Does Not Conflict with the Opinions of the Fourth or Fifth Circuits on the Preemption of State Partnership Law by § 365(e) of the Bankruptcy Code.

In its initial Question Presented, Petitioner contends that the Third Circuit's interpretation of 11 U.S.C. § 365(e) is inconsistent with decisions reached by the Fourth and Fifth Circuits. However, neither of the Circuit Court decisions relied upon by Petitioner directly addressed the interplay between § 365 and state partnership law. It is thus not surprising that neither of the cases which Petitioner now alleges create a conflict between the Circuits was even cited in Petitioner's Brief to the Third Circuit below.

In the case *sub judice*, when Victor filed his bankruptcy petition, Victor and Leah were engaged as partners pursuant to a written partnership agreement. Relying on established case law, the Third Circuit determined that the partnership agreement was an executory contract, subject to the provisions of § 365 of the Bankruptcy Code. The Third Circuit relied upon 11 U.S.C. § 365(e)(1)(B), in holding that the partnership agreement could not be terminated or modified by a provision of state partnership law which mandates dissolution on the filing of a bankruptcy petition. In so holding, the Court noted that § 365(c) would ordinarily prohibit a trustee's assumption or assignment of a partnership agreement where the other party does not consent to the assumption or assignment. However, because there was no evidence that Leah did not consent to remaining partners with Victor during the pendency of Victor's bankruptcy, § 365(c) was inapplicable.

Neither of the cases cited by Petitioner as being in conflict with the Third Circuit decision sought to interpret the interplay between state law and § 365 of the Bankruptcy Code. In *Phillips v. First City, Texas-Tyler, NA* (*In Re Phillips*), 966 F.2d 926 (5th Cir. 1992), the Fifth Circuit considered only the right of a general partner, under Fed. Bankr. R. 1004(a), to file a bankruptcy petition on behalf of a partnership which had previously been terminated by court decree. The limited partner, who objected to the bankruptcy filing, argued that following the decree of dissolution the general partner had filed a Chapter 11 bankruptcy proceeding which, under Texas Partnership law, restricted his further authority to act on behalf of the partnership. The District Court ruled that Fed. Bankr. R. 1004(a) preempted Texas partnership law, holding that under the United States Constitution's Supremacy Clause, Fed. Bankr. R. 1004(a) rendered the general partner's personal bankruptcy filing irrelevant to his authority to place the partnership in Chapter 11 proceedings. The Fifth Circuit reversed, holding that while Fed. Bankr. R. 1004(a) defines who can file a bankruptcy proceeding on behalf of a partnership (i.e. a general partner), the definition "general partner" is left to state law.

The decision in *In Re Phillips* does not discuss the preemptive effect of § 365(e), due to the fact that the parties had agreed that the partnership agreement had been terminated by court decree prior to the general partner's bankruptcy filing. Moreover, in *dicta*, the Fifth Circuit differentiates *In re Phillips* from *In Re Rittenhouse Carpet, Inc.*, 56 B.R. 131 (Bankr. E.D. Penn. 1985), which is consistent with the Third Circuit's decision below, based on its conclusion ". . . that *Rittenhouse* concerns a conflict of state partnership law with 11 U.S.C. § 365(e), and has nothing to do with rule 1004(a). . . ." *In Re Phillips*, 966 F.2d at 935.

The decision of the Fourth Circuit in *Shearin v. Shearin* (*In Re Shearin*), 224 F.3d 346 (4th Cir. 2000), *cert. denied*, 531 U.S. 1149 (2001), similarly does not conflict with the Third Circuit's decision below. The sole issue in *In Re Shearin* related to the interest of a Chapter 7 trustee to the debtor-partner's distributive share of partnership profits accrued prior to the date of the bankruptcy filing. While the decision in *In Re Shearin* makes reference to Virginia's version of the Uniform Partnership Act, which provides that the bankruptcy of any partner causes a dissolution of the partnership, the court did not address the preemptive effect of 11 U.S.C. § 365(e), due to the fact neither party had taken the position that the debtor's interest in the partnership agreement should be assumed or assigned by the trustee.

The Circuit Court decisions which Petitioner alleges conflict with the Third Circuit's interpretation of § 365(e) entirely fail to address the First Question raised in its Petition for Certiorari. Moreover, the only Circuit Court decision which directly addressed the issue raised in Petitioner's First Question is not even cited in the Petition. Specifically, in *Summit Investment and Development Corp. v. Leroux*, 69 F.3d 608 (1st Cir. 1995) the First Circuit held that Bankruptcy Code § 365(e) preempts enforcement of *ipso facto* provisions contained in state partnership law. The decision of the Third Circuit in the case below is thus consistent with the only Circuit Court decision directly addressing the issue.

2. The Third Circuit's Interpretation of Pennsylvania Partnership Law is Limited to the Unique Facts Presented, and is Consistent with Prior Decisions of the State's Highest Court.

The issue raised in the Petitioner's Second Question does not involve a federal question. Rather, it relates solely to an interpretation of Pennsylvania's partnership law, based on the unique facts presented.

In both *Herman v. Pepper*, 166 A. 587 (Pa. 1933) and *Potter v. Brown*, 195 A. 901 (Pa. 1938), the Pennsylvania Supreme Court recognized that dissolution is an equitable remedy to be exercised by a court only upon good cause. These cases, which were both cited and relied upon by the Third Circuit below, involved requests for judicial dissolution of partnerships based upon the equities presented. Neither case supports Petitioner's contention that a partnership is automatically dissolved, without court intervention, by reason of the exclusion of a partner from the partnership's affairs.

Petitioner's suggestion that the Third Circuit's decision conflicts with the Pennsylvania Supreme Court's decision in *Girard Bank v. Haley*, 460 Pa. 237, 332 A.2d 443 (1975) is similarly without merit. In *Girard Bank*, the court addressed the dissolution of an at will partnership pursuant to a written partnership agreement which was silent as to winding up and liquidation. The court determined that because there was no fixed term, either party could terminate the partnership at will. Such was not the case with the partnership agreement for the Legends, which provided a mechanism for dissolution and winding up of the partnership.

The equities in the present case clearly did not warrant a finding that the Legends Partnership had been dissolved by the parties prior to Victor's death. As noted in Judge Rendell's concurring opinion, prior to Victor's death, neither party took the position that the partnership had been previously dissolved by reason of the claimed exclusions from participation in the partnership's affairs.

Petitioner's comparison of this case to the decision of the First Circuit Court of Appeals in *Infusaid Corp. v. Intermedics Infusaid, Inc.*, 739 F.2d 661 (1984), and cases of other states fails to recognize the substantive differences between the Pennsylvania statute and versions of the UPA adopted in other jurisdictions. The Pennsylvania statute does not expressly give a partner the unilateral right to terminate a partnership. Rather, the statute provides that dissolution is caused, without violation of the agreement between the parties, "[b]y the expulsion of any partner from the business bona fides *in accordance with a such a power conferred by the agreement between the partners*. 15 Pa. C.S. § 8353(1)(iv) (emphasis added.). As noted in the Third Circuit's opinion, the full text of the statute makes it clear that only those expulsions that are in conformance with the expulsion powers of the partnership agreement are sufficient to cause an automatic dissolution by operation of law. In contrast, the Massachusetts version of the Uniform Partnership Act interpreted in *Infusaid* provides that *per se* dissolution may be caused by the express will of any partner at any time, even "[i]n contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provisions of this section." Mass Gen Laws ch. 108A, § 31(2).

This is simply a case of the Third Circuit interpreting Pennsylvania partnership law based on the unique facts before it. The fact sensitive nature of the case and the lack of a federal question precludes review by this Court.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Certiorari.

Respectfully submitted,

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